Michael Green
D. Wiley Barker
CROWLEY FLECK PLLP
100 North Park, Suite 300
P. O. Box 797
Helena, MT 59624-0797
Telephone: (406) 449-4165

Attorneys for Ft. Harrison Veterans Residence, L.P.

MONTANA FIRST JUDICIAL DISTRICT COURT, LEWIS AND CLARK COUNTY

FT. HARRISON VETERANS RESIDENCE, Limited Partnership, Petitioner, vs. MONTANA BOARD OF HOUSING, Respondent, CENTER STREET LP, SWEET GRASS APARTMENTS LP, SOROPTIMIST VILLAGE LP, FARMHOUSE PARTNERS-HAGGERTY LP AND PARKVIEW VILLAGE LLP, Intervenors.	Cause No. DDV-2012-356 Judge: James P. Reynolds **FT. HARRISON VETERANS RESIDENCE, L.P.'S REPLY IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT AND RESPONSE TO CROSS MOTION FOR SUMMARY JUDGMENT**

Petitioner Ft. Harrison Veterans Residence, Limited Partnership ("Ft. Harrison"), by and through its counsel of record, hereby submits for the Court's consideration this reply in support of its motion for summary judgment and response to Respondent's Combined Reply Brief to Petitioner's Response to Materials Submitted by Montana Board of Housing, Brief in Response to Petitioner's Motion for Summary Judgment, and Brief in Support of Respondent's Cross Motion for Summary Judgment on Merits (the "Board's brief"), filed October 29, 2012, and Intervenors' Combined Reply Brief to Ft. Harrison's Response to Materials Submitted by Montana Board of Housing and Intervenors and Brief in Response to Fort Harrison's Motion for Summary Judgment ("Intervenors' brief"), filed October 29, 2012.

ARGUMENT

The Court should grant Ft. Harrison's motion for summary judgment and reject the arguments of the Montana Board of Housing (the "Board") and Intervenors. The Court cannot place its judicial stamp of approval on the 2012 award of low-income housing tax credits ("LIHTC"). The process is riddled with substantial errors and abuses of discretion. The Board continues to disclose errors, including those newly admitted in the Board's most recent brief. The Board was apparently unaware of these errors when it relied upon the scoring process to make its final award of the LIHTCs, which demonstrates the arbitrary and capricious nature of the Board's actions.

The Board further confuses the issues by introducing new and conflicting arguments in its most recent brief. The Board offers the affidavit of Bruce Brensdal, which provides new facts and argument that add to, and in some cases contradict, the prior testimony of the Board's witness, Mary Bair. Mr. Brensdal's affidavit also includes exhibits that were never disclosed to Ft. Harrison, despite a public records request in April of this year.

The Court should reject that the 2012 allocation process was fair and proper. Contrary to the Board's claims, its considerations were improper whether or not they formed the basis for its decision. The criteria the staff applied to Ft. Harrison's application was not found in the 2012 Qualified Allocation Plan ("QAP") and is not a reasonable construction of its plain language. The Court should also reject the Board's argument regarding the Energy and Green criteria because it is incorrectly calculated. Furthermore, the staff's post-submission communication with the applicants were improper and their contents are either unrecorded or undisclosed.

Finally, the Court must reject the commerce clause argument the Board and Intervenors join in offering. Their argument is based on a concurring opinion from a concurring and dissenting opinion of a single judge in the Third Circuit and is contrary to well established law. The case law Ft. Harrison provided in its brief in support, as well as numerous other cases, demonstrate that the express discrimination in the language of the QAP subjects it to the strictest scrutiny, and the Court should invalidate it.

I. THE COURT SHOULD GRANT FT. HARRISON'S MOTION FOR SUMMARY JUDGMENT BECAUSE THE BOARD MADE IMPROPER CONSIDERATIONS DURING THE 2012 QAP PROCESS.

In its brief, the Board criticizes Ft. Harrison's argument that the Board inappropriately considered whether LIHTCs are the "best source of funding for veteran needs." (Board Br., p.

8.) The Board claims, "[t]here is no evidence to demonstrate that the Board made its decision based upon this concern." (*Id.*) However, this mischaracterizes the Board's duties. The Board is prohibited not only from **basing** its decision on factors not listed in the QAP, but also from **considering** factors not listed in the QAP. The QAP plainly states, "[t]he Board may **consider** the following factors in selecting projects for an award of tax credits to qualifying projects . . . ." (QAP, p. 24 (emphasis added).) The QAP then goes on to provide a finite list of considerations. (*Id.* at 25.) As explained in Ft. Harrison's brief in support, this consideration does not fit into any of those listed in the QAP. Accordingly, the Court should reverse the Board's decision.

The Court should also reject the Board's claim that "[t]here is no evidence" of the basis of the Board's decision. (Board Br., p. 8.) Ft. Harrison has produced all available evidence of what the Board considered during the allocation process. Ft. Harrison bases its claim upon personal attendance at, and the official minutes of, the Board's April 9, 2012, meeting, at which the final decision on the 2012 allocation of LIHTCs was made. (*See* Ft. Harrison's Br. in Supp. of Mot. for Summ. J., p. 9.)

Any lack of evidence is a direct result of the Board's failure to maintain and produce relevant records or provide any explanation of the reasons behind its decision. Ft. Harrison made a public records request to the Board on April 23, 2012, requesting "[a]ll documents evidencing the review, scoring, and/or selection of the applications for the 2012 award period." (*See* Ex. E to Ft. Harrison's Submission of Additional Materials.) The Board did not produce minutes of the April 9, 2012, meeting, however, or any other document evidencing the basis of the Board's decision. Only later did the Board disclosed these minutes as Exhibit K to Mary Bair's affidavit. Simply put, the Board improperly considered criteria not found within the QAP and has not kept adequate records and did not disclose all pertinent documents regarding the basis of its decision. The Court should not now allow the Board to use its failure to maintain proper records as a shield from valid claims.

II. THE COURT SHOULD REJECT THE BOARD'S ARGUMENTS BECAUSE THE BOARD'S DECISION VIOLATED THE STANDARD OF JUDICIAL REVIEW.

The Board's actions in the scoring process have been arbitrary, capricious, and unlawful. The staff improperly added undisclosed criteria to the scoring provisions that cannot be construed as a reasonable interpretation, as the Board claims. The additional requirements the Board placed upon Ft. Harrison were patently beyond the plain meaning of the QAP. Contrary

to the Board's contention, fixing these errors will make Ft. Harrison eligible for an award of LIHTCs by placing it among the top-scoring applicants.

Regardless of the final scoring, however, the LIHTC allocation process is so riddled with errors that the Court should not reward the Board with judicial approval. With each review of the scoring process, more errors are disclosed, as set out below. These errors were present but unknown when the Board relied on the scoring to make its determination. The presence of these errors in the provisions Ft. Harrison contests logically suggests that other similar errors are present elsewhere in the process. The extent of these errors is unknown and may have affected the outcome of the 2012 award. Accordingly, the Court should reverse the Board's decision.

As an initial matter, the Court should reject the Board's contention that it did not base its decision on the staff's scoring. (*See* Board Br., p. 7.) This claim is simply false. As explained in Ft. Harrison's brief in support, the Board's staff testified that the Board relied solely on scoring to make the LIHTC allocation. (Ft. Harrison's Br. in Supp. of Summ. J., p. 9.) Ft. Harrison provides the following portions of Ms. Bair's deposition to clarify the issue for the Court:

> Q. Okay. And in this case, they didn't offer any explanation and, therefore, they were bound by the points; is that your understanding?
> A. **They didn't go outside of the points**, so they didn't have to do that.
> . . .
>
> Q. In this case, though, for 2012, they did not exercise that discretion?
> A. No, they didn't end up there.

(Bair Depo., 119:10-14, 22-24 (emphasis added).) This should also resolve any confusion created when the Board misstated Ft. Harrison's argument, claiming Ft. Harrison relied solely on the Board's past practice to claim the Board allocated the LIHTCs based on scoring in 2012. (Board Br., p. 7.) The Board's own staff testified that its decision was based exclusively on the scoring.

The Court should not summarily dismiss Ms. Bair's testimony, as the Board suggests. Ms. Bair is the Manager of the Multifamily Program and was previously employed as the Officer of the Multifamily Program. (Bair Aff., p. 2, ¶ 2.) She has been deeply involved with the all stages of the LIHTC allocation process, and is accordingly intricately familiar with the Board's operations. (*See id.* at 2, ¶ 3.) Rather, the Court should disregard the attorney argument the Board now presents to try to discredit Ms. Bair's testimony.

Even if the decision was not based on the scoring, however, the process is so flawed that the Court must not grant it judicial approval. The pervasive errors inevitably influenced the Board's decision and are grounds for reversal. The staff went so far as to make recommendations to the Board based on the scoring. The documents evidencing these recommendations were produced for the first time with the Board's most recent brief. Not surprisingly, the Board followed the recommendations exactly.

The Court should also reject the Board's claim that the Board is not required to provide an explanation for its decisions if it relies on something besides the scoring. (Board Br., p. 7.) Again, the Board attempts to use attorney argument to reverse Ms. Bair's testimony. The QAP states, "[i]f the Board awards credit to an applicant where the award is not in keeping with the established priorities and selection criteria of this Plan, it will publish a written explanation that will be made available to the general public pursuant to Section 42(m)(1)(A)(iv) of the Internal Revenue Code." (QAP, p. 25.) The term "selection criteria" refers to the scoring provisions in the QAP. (*Id.* at 19 ("Development Selection Criteria").) Ms. Bair testified that this provision means that if the Board makes a decision outside the scoring, it must provide an explanation.

Q. Well, I understand that. But if they go outside the points, then they need to explain that decision; correct?
A. Yes.

(Bair Depo., p. 119:6-9.) To the extent the Board argues the Court should accept the staff's interpretation of the QAP provisions for scoring, the Board should also accept the staff's interpretation of the QAP provision as to other requirements, such as this.

In addition, this interpretation is logical and is necessary to comply with Montana law. Logically, if the Board bases its decision on the scoring, no additional explanation is necessary because its basis is clear. If the Board bases its decision on something other than scoring, however, an explanation is necessary. Apart from a written explanation, there would be no record of the basis for the Board's decision.

In this regard, an explanation is necessary to comply with Montana law. A record is necessary to perform judicial review. *See, e.g.*, *Owens v. Dep't of Revenue*, 2006 MT 36, ¶ 13, 331 Mont. 166, 130 P.3d 1256 (finding that even where numerous exhibits are produced, judicial review of a contested case requires an administrative record). The Board and Intervenors conceded at the hearing on the Board's motion to dismiss that judicial review is proper in this matter. However, considering the Board's refusal to comply with MAPA record requirements

and its overall poor recordkeeping, the scoring is the only record of the basis for the Board's decision. That Board must not escape review simply because it failed to provide the appropriate record. Accordingly, the Court must reject the Board's interpretation of this provision of the QAP.

A. The staff's actions during the scoring process were not a reasonable interpretation of the QAP.

The Board's argument on this point is based on a misunderstanding of Montana law. On one hand, the Board cites the Montana canon of construction that "[n]o interpretation is required when the plain meaning can be derived from the words of the [rule]." (Board's Br., p. 4 (citing *Glendive Medical Ctr. v. Mont. Dep't of Pub. Health and Human Servs.*, 2002 MT 131, ¶ 15, 310 Mont. 156, 49 P.3d 560).) This canon does not allow the staff to apply criteria not found in the plain language of the QAP. However, the Board argues the staff was entitled to apply additional criteria it felt "flow[ed] naturally and necessarily from the language" of the QAP. (*Id.* at 17.) The Board attempts to use this argument to justify staff action clearly beyond the plain meaning of the QAP, and in support cites the case of *Glendive*. (*Id.* at 5.)

Glendive is distinct from the instant matter. The Selection Criteria in the QAP are nothing like the rule analyzed in *Glendive*. In *Glendive*, the veterans administration ("VA") met the definition of "third party" for purposes of Medicaid reimbursement. *Glendive*, ¶¶ 8-9. The statutory definition of "third party" was defined as

> an **individual, institution, corporation, or public or private agency** that is or may be liable to pay all or part of the cost of medical treatment and medical-related services for personal injury, disease, illness, or disability of a recipient of medical assistance from the department or a county and **includes but is not limited to** insurers, health service organizations, and parties liable or who may be liable in tort. Indian health services is not a third party within the meaning of this definition.

Glendive, ¶ 16 (quoting ARM 37.85.407(2)(a)).

The Montana Supreme Court held that the VA fell within the plain language of the rule. *Id.* ¶ 31. It also held that since the definition at issue was unambiguous the "Court needs to look no further than its plain meaning." *Id.* ¶ 24. It also cited the canon of construction that "if the meaning of the statute or rule can be determined from the language used, the court is not at liberty to add or to detract from the language therein." *Id.* ¶ 15. This comports statutory expression of this canon, "the office of the judge is simply to ascertain and declare what is in

terms or in substance contained therein, not to insert what has been omitted or to omit what has been inserted." § 1-2-101, MCA.

Unlike the rule in *Glendive*, the scoring provisions of the QAP are not designed to be inclusive. The language of the criteria at issue is set out below. It does not include terms such as "not limited to" or anything similar. Unlike the rule above, the provisions of the QAP are not phrased in general terms or intended to include numerous types of entities. Rather, the provisions of the QAP are short, plain statements. The lists contained in these provisions are finite and comprehensive. Accordingly, the plain meaning of the scoring provisions does not allow an expansive definition, as the Board suggests.

First, the staff improperly added to the "project location" scoring provision, which states: "Project Location (0-3 points): Developments located in a given area where amenities and/or services will be available to tenants (schools, medical services, shopping, transportation.) (0-3 points)" (QAP, p. 20.) No other language in the QAP addresses this provision. In its brief, the Board claims words location, area, and available justify the additional criteria the Board applied to Ft. Harrison during the scoring process. (Board's Br., pp. 12-13.) As a result, the Board claims the staff "reasonably and properly" deducted points from Ft. Harrison's score by interpreting these words.

However, the criteria the staff applied against Ft. Harrison cannot reasonably be inferred from "looking at the plain meaning" of the QAP. Ms. Bair testified that points were deducted based on the type of transportation the staff imagined the future tenants would use and which roads they would travel on. ". . . [Y]ou're talking about riding a bicycle on a busy highway. And these distances are a fair amount further when you're talking about someone walking or riding a bicycle." (Bair Depo., 98:22-11.) Despite the finite list of services included in the provision (schools, medical services, shopping, and transportation) Ms. Bair also considered other services, such as banks and "any recreation." (*Id.* 95:3-6.) Ft. Harrison could not reasonably be expected to guess which additional services and what type of transportation the staff would imagine future residents using at the facility, and these additional considerations do not flow naturally from the term "available." Furthermore, banks, recreation, and other services cannot be read from the terms schools, medical services, shopping, and transportation. The Board amends the QAP each year. If it wished to consider those criteria, it should have included

them in the QAP. However, it did not, and the staff's additional considerations are clearly outside the provisions stated above.

The Board now presents new arguments and rationale for the staff's actions in Mr. Brensdal's affidavit. Mr. Brensdal claims Ft. Harrison also lost points because one of the three public transportation options Ft. Harrison provided in its application materials, Curb-to-Curb, "is the only identified transportation service potentially available at Fort Harrison from 6:30 a.m. to 5:30 p.m. and it is 'subject to availability' unless reserved a day ahead of time." (Brensdal Aff., p. 4, ¶ 11.) Staff apparently deducted points from Ft. Harrison's application because "[n]o transportation service is shown for the hours between 5:30 p.m. and 6:30 a.m." Taken to its logical conclusion, Mr. Brensdal's affidavit suggests the words location, area, and available indicate that public transportation should be available at all times and have no restrictions on when or how far in advance it must be scheduled. Clearly these requirements do not flow from the plain meaning of the QAP provisions.

It is also important to note Mr. Brensdal's requirements differ from the requirements Ms. Bair testified to in her deposition. Ft. Harrison, or any other applicant, cannot reasonably be expected to guess all of the different interpretations different Board members may apply, especially when these interpretations conflict. For this reason, Mr. Brensdal's affidavit again demonstrates the arbitrary and capricious nature of the scoring process.

For similar reasons, the Court should reject the Board's arguments regarding the "tenant populations with special housing needs" provision, which states:

> Tenant Populations with Special Housing Needs (0-10 points): Scoring in this category will be based on identified community and state housing needs, and the extent to which the proposed project addresses those needs. A project will receive one (1) point for each 10% of the units targeting the following identified needs:
>
> - Units targeted specifically for individuals with children (Family units 2 bedrooms).
> - Large family units (3 and 4 bedroom).
> - Handicapped units exceeding minimum fair housing requirements.
> - Units targeted specifically for elderly.
> - Units targeted specifically persons of disability (must include written agreement with service provider or advocate for the target group).

(QAP, p. 23.) The QAP offers no further explanation.

The Board begins by misstating Ft. Harrison's argument. Although the Board claims Ft. Harrison "argues that the QAP is 'silent' on whether the specific units must be targeted or

identified," this is not what Ft. Harrison argued in its brief in support. Rather, Ft. Harrison argued that "[t]he QAP is silent on whether specific units must be **identified** or what the contents of the agreement must state." (Ft. Harrison Br. in Supp. of Summ. J., p. 14 (emphasis added).) Ft. Harrison does not deny units must be targeted. Ft. Harrison simply argues nothing in the language of the QAP indicates that double counting a unit for more than one group is prohibited, which is true. The Board simply cannot refute this argument.

Instead, the Board again complicates the issues by introducing new, and unsupported, justifications for the Board's actions. The Board claims that "[t]o obtain 100% of the possible points for Special Needs Targeting, the application must specifically target 100% of the project units." (Board Br., p. 16.) This language is found nowhere in QAP. Nothing in the QAP indicates an applicant cannot target the same percentage of units for more than one group. Nothing in the QAP requires the applicant to identify which units are included in that percentage. These statements cannot be anticipated by the applicant, and should not be condoned by the Court.

Moreover, the Court should accept Ft. Harrison's argument regarding the contents of the services agreement because the Board refuses to address this argument in its brief. (*See* Ft. Harrison's Br. in Supp. of Summ. J., p. 14.) The Board's contention that somehow this criteria now does not matter stands in stark contrast to Ms. Bair's deposition testimony and further confuses the issues.

The Board also acknowledges additional scoring errors concerning this criteria that were not previously disclosed. The Board now admits for the first time that "Parkview was erroneously awarded 10 of 10 points . . . [but] should have been awarded only 8 points in this category." (Board Br., p. 18; Brensdal Aff., p. 7. ¶ 21.) This demonstrates the pervasive problems with the 2012 scoring process. With each review, the Board uncovers more errors. These errors have been uncovered only because they relate to the provisions challenged by Ft. Harrison. It is unclear what other errors exist related to provisions not yet re-examined by the Board. The Board attempts to justify these errors by claiming it could have exercised discretion to award Parkview tax credits. (Brensdal Aff., p. 12, ¶ 36.) However, unused discretion does not cure the errors of the 2012 allocation process and does not change the fact that the LIHTCs were awarded based on erroneous scoring. The Court must not give judicial approval to a decision and process plagued by so many errors.

Finally, the staff also inappropriately added criteria to the scoring provision for "Montana presence," which states:

> Demonstration of a Montana Presence: In order to assist in providing a better quality product consistent with the purposes of the [Board] and federal law, a development will qualify for points if a member of its development team is Montana based. One (1) point will be awarded for each of the following (0-4 maximum):
>
> - Developer or Project Manager. (A developer has existing affordable housing project(s) in Montana with a demonstrated quality product.)
> - Contract or Construction Manager
> - Either the Consultant, Syndicator, Attorney, Accountant, Architect or Engineers

(QAP, p. 23.)

The Board initially argued that the plain meaning of this language indicates that two points are possible for each of the first two bullet points, but only one point is possible for the final bullet point. As Ms. Bair testified,

> A. In the past, they have been able to – we have counted more than they may have been able to get. One for developer, one for project manager, one for contractor, one for construction manager and then one for the last category."
> Q. . . . [S]o they could get a total of four for the first two bullets?
> A. Possibly.

(Bair Depo. 74:2-9.)

This interpretation is unreasonable for three reasons. First, the plain language of the rule states "[o]ne (1) point will be awarded for each of the following." (QAP, p. 23.) Second, adding the word "either" to a sentence with the word "or" does not change the meaning. It is the same to say "A or B" as it is to say "either A or B." Third, the Board misuses the word "either" in the final bullet point. Either is correctly used with only two options, not six as it was in the QAP. *Random House Webster's College Dictionary* 418 (2nd ed. 1997) (defining either as "one or the other of two.") Considering these things, the Board is arguing that misusing a term that does not change the meaning of the language somehow indicates that the points for this criteria should awarded in a manner that is in direct conflict with the plain language of the QAP. This position is absurd, and the Court must reject it.

However, the Board again confuses the issue by introducing new illogical arguments and taking a position contrary to Ms. Bair's prior testimony. The Board claims that staff "reasonably awarded" Ft. Harrison two of four points because the team members Ft. Harrison offered under

the first and second bullet points did not have "any Montana presence." (*Id.* at 14-15.) At the same time, however, the Board claims all of Ft. Harrison's team fell under the third bullet point, which the QAP states is eligible for only one point. (*Id.* at 15.) The Board does not explain why Ft. Harrison received two points instead of one. Even at this stage of review, the Board's interpretation of the QAP conflicts with its plain meaning.

In addition, the Board now argues, for the first time, that although the QAP allows for 3 points (one for each bullet point), "it is not clear with respect to how an applicant earns the fourth of 4 points." (Board Br., p. 15.) This is in direct conflict with Ms. Bair's deposition testimony, as set out above, and the Court should reject the Board's attempt to argue in contradiction of the testimony of its own witnesses. Moreover, it ignores that all other applicants were awarded four points, despite the staff's apparent confusion. (Selection Criteria, Ex. C to Ft. Harrison's Additional Materials.)

Considering the newly identified errors, the Board's confusion of the issues, and the contradictory positions the Board now assumes, the Court must reject the Board's arguments. The Court must not put its stamp of judicial approval on a process that is so convoluted and prone to error. Allowing the Board to score applications and award LIHTC under the current process ensures erroneous decisions and future litigation.

B. Correcting the errors will qualify Ft. Harrison as one of the top-scoring applicants.

The Board's argument is based on the incorrect claim that Ft. Harrison's scores should be reduced by four points under the Energy and Green criteria. The Board now admits "staff was not authorized to disregard the actual scores under the QAP criteria" and the "actual Energy and Green scores should have been awarded to the respective applicants and the resulting total scores should have been presented to the Board." (Board Br., p. 9.) Through Mr. Brensdal's affidavit, the Board claims Ft. Harrison should have received only six out of ten possible points for the Energy and Green criteria. (*Id.* at 10.) As a result, the Board argues Ft. Harrison would have received a total of 102 points, and fallen outside the top-scoring applications. (*Id.* at 19.)

This admission demonstrates the arbitrary, capricious, and unlawful nature of the Board's decision. The Board now admits the staff violated the provisions of the QAP, which was adopted as an administrative rule. It admits the final allocation of LIHTCs for 2012 was based in part on this unauthorized and undisclosed action. Had the current process provided for some review by the Board, rather than complete reliance on the staff, this issue may have been

resolved before the Board bound itself to a final decision. Instead, a lawsuit was required to bring the issue to the Board's attention. The Court must not sanction an unworkable program of this nature.

In addition, the staff's calculation of Ft. Harrison's score for the Energy and Green criteria is incorrect. Careful review of the Energy and Green scoring criteria reveals that Ft. Harrison should have received ten points, not six as the Board claims. The staff's scoring was incorrect in two respects. First, the Board claims Ft. Harrison was ineligible for the two discretionary points on the Energy portion of the criteria because they did not meet the threshold points. (*See* Board Br., p. 9; Brensdal Aff., p. 9, ¶ 30.) However, as Ms. Bair testified at her deposition, this language is not in the QAP. (Bair Depo., 80:24-81:1 ("It doesn't state that, but that's the way our understanding of it was.").) Again, the staff added criteria beyond the plain language of the QAP.

Ft. Harrison's application demonstrates it should have received these two points. For rehabilitation construction, like Ft. Harrison's development, the QAP allows two additional points for applicants providing six to twelve items in the discretionary portion of the Energy checklist. (QAP, p. 22.) The architect letter Ft. Harrison included with its application materials shows Ft. Harrison provided the requisite six items: water flow saving devices, florescent lights, programmable thermostats, ceiling fans, hot water pipe insulation, and commissioning conduct. (*See* Architect Letter from VOA Associates, Inc. to Don Paxton, p. 1 (Jan. 16, 2012), attached as **Exhibit A**.) Accordingly, staff should have awarded Ft. Harrison two additional points.

Second, staff awarded points to other applicants while denying points to Ft. Harrison on the same basis. The Board claims it reduced Ft. Harrison's Energy and Green score by an additional two points because its architect letter stated that it would meet, but did not confirm it would exceed, IECC 2009 standards for insulation and windows. (Board Br., p. 10; Brensdal Aff., p. 10, ¶ 32.) The QAP requires the windows and insulation to exceed the IECC 2009 standard. (QAP, p. 21.)

However, other applicants received the full points for similar letters. Chosen applicant Depot Place and applicant Aspen Place received the full ten points for the Energy and Green criteria. However, the architect letters they submitted do not meet the requirements of the QAP. (*See* Architect Letter from Paradigm V2 Architects (Jan. 16, 2012), attached as **Exhibits B and C**.) Although these letters, which are nearly identical, initially state that "[a]ll windows used in

the project shall exceed the requirement of the IECC 2009 Standards for Climate Zone 6," it is evident from the remainder of the letters that this statement is false. (*Id.*) As the letters explain, "Zone 6 windows are required to have a U Factor = 0.33" to meet the IECC 2009 standards. (*Id.*) A U Factor lower than 0.33 is required to exceed, not just meet, the IECC requirement. However, the letters state "[a]ll new windows shall have a maximum glazing U-Factor range of 0.30 to 0.33. Smaller windows have a higher U-factor that is **less efficient**. **We are striving for windows with a U-factor of 0.32 or lower.**" (*Id.*)

These windows will not exceed the IECC 2009 standards. Windows that are less efficient than the required standard and "striving" to exceed the requirements are insufficient to qualify for additional points.

The Board is not justified in denying Ft. Harrison points on this basis while awarding points to Depot Place and Aspen Place. The QAP states that "[c]riteria for each application will be compared to other applications." (QAP, p. 21.) If Depot Place and Aspen place receive the additional two points on this basis, Ft. Harrison must also.

Recognizing these points, Ft. Harrison should have received the full points for Energy and Green, bringing its point total to 106, and tying Ft. Harrison with Soroptimist Village for the highest scoring project. Any other finding would abrogate the plain language of the QAP and treat Ft. Harrison unfairly compared to other applicants. Accordingly, the Court must reject the Board's argument regarding the Energy and Green criteria.

C. The Court should reject the Board's argument regarding contact with the staff after submission of applications.

The Board begins again by mischaracterizing Ft. Harrison's argument regarding the information staff shared and received after the deadline for submitting applications. In its brief, the Board stated that Ft. Harrison "incorrectly argues that nothing in the QAP allowed for such clarifications or corrections." (Board Br., p. 11.) The Board then cites to the QAP provision that states the Board "may allow minor corrections to applications." (*Id.* (quoting QAP, p. 17).) However, the Board ignores the fact that Ft. Harrison cited this same provision in its brief, where it stated, "[a]lthough the 2012 QAP allows 'minor corrections,' this opportunity should have been made available to all applicants." (Ft. Harrison's Br. in Supp. of Mot. for Summ. J., p. 11.)

The Board also fails to address Ft. Harrison's argument that communications between developers and staff were not, but should have been, recorded and disclosed to all applicants to ensure a fair and transparent process. Neither does the Board address the fact that nothing in the

QAP allows for the late submission of application materials. As a result, the Court should accept Ft. Harrison's arguments.

The remainder of the Board's argument is equally flawed. The Court should not allow the Board to benefit from its own faulty recordkeeping. The Board claims Ft. Harrison "has shown no unfairness or prejudice to its application or score as a result of any such communications, clarifications or corrections." (Board's Br., p. 11.) While Ft. Harrison disputes this claim, any lack of evidence is a result of the Board's failure to keep appropriate records.

No one, not even the Board itself, knows what communications occurred between staff and the developers after the application deadline. This is because the Board did not require, and the staff did not keep, adequate records. When questioned about these records during her deposition, Ms. Bair stated "[t]here could be all kinds of them. It just depends on what we're requesting." (Bair Depo., 29:25-30:3.) When the staff communicated with developers by phone, Ms. Bair testified the staff would "[s]ometimes just make a note in our notes, just make sure that they get it back to us, what we need." (*Id.* 30:12-13.) Ms. Bair claims these "notes" were recorded on a "scoring sheet" or a "phone log" used for "phone calls in general." (*Id.* 30:18-31:6.) Even if these records exist, they have not been disclosed to Ft. Harrison, despite the public records request.

The Court should also reject the Board's claims that Ft. Harrison benefitted from this type of communication. The Board claims Ft. Harrison "was permitted to supplement its application . . . through submission of the April 5, 2012 letter from Donald Paxton to Mary Bair." (Board's Br., pp. 11-12.) However, the Board fails to note that this letter was sent after staff completed the scoring of the applications. In fact, the letter was written in response to "receipt of [staff's] communication dated April 3, 2012 in which **the scores [were] published** for the 2012 LIHTC applications." (Letter from Donald Paxton to Mary Bair, p. 1 (Apr. 5, 2012), Exhibit L to Bair Aff. (emphasis added).)

Moreover, the Board summarily dismissed the letter without independent inquiry at the April 9, 2012, Board meeting. According to the minutes, a Board member simply asked Ms. Bair if the letter changed the staff's scoring, to which Ms. Bair "replied that staff was comfortable that the project was scored in conformance with the provisions of the QAP." (Board Meeting Minutes, p. 8 (Apr. 9, 2012).) There was no further consideration of letter and no specific mention on any of its contents. Minutes later, Ft. Harrison's application was denied an

award of tax credits. (*Id.*) The representation that this somehow gave Ft. Harrison an advantage is false.

Second, the Board's claim regarding the email between the staff and Ft. Harrison is a red herring. This argument is nothing more than a failed attempt to justify poor policy and procedure. The fact that staff sent a single email to Ft. Harrison does not justify the staff's undisclosed communications with other developers after the submission deadline, or the Board's failure to keep adequate records of those communications.

Considering the staff's use of additional criteria, errors in scoring, and undisclosed communications with applicants after the submission deadline, the Court must not approve of the Board's decision. The Court must not allow such a flawed process to continue to decide the recipients of millions of dollars worth of tax credits.

III. THE COURT SHOULD REJECT THE DORMANT COMMERCE CLAUSE ARGUMENT SET OUT BY INTERVENORS AND JOINED BY THE BOARD BECAUSE IT IS NOT BASED ON VALID LAW.

Since the Board and Intervenors agreed at oral argument on the Board's motion to dismiss that mootness is no longer an issue in this matter, Ft. Harrison will address only the final argument of Intervenors' brief regarding the Dormant Commerce Clause.

Intervenors' argument fails because it is not based on valid law. Intervenors base their arguments on *Keystone Redevelopment Partners, LLC v. Decker*, 631 F.3d 89 (3d Cir. 2011), where they claim "[t]he Third Circuit Court of Appeals held that both steps of the Dormant Commerce Clause analysis were met." (Board Br., p. 7.) However, this statement is patently false. The majority in *Keystone* did not address the Dormant Commerce Clause. The statements Intervenors refer to were made in the concurring and dissenting opinion. The Third Circuit's opinion ends on page 101. These statements are found on pages 107 through 109.

Moreover, the Court should disregard this dissenting and concurring opinion because it is in stark contrast to well established constitutional law. Regarding the Dormant Commerce Clause, the initial question is whether the law "regulates evenhandedly with only incidental effects on interstate commerce, or discriminates against interstate commerce." *Oregon Waste Systems*, 511 U.S. at 99 (quoting *Hughes v. Oklahoma*, 441 U.S. 322, 336 (1979)). The United States Supreme Court has stated numerous times that discriminatory laws are subject to a "virtually *per se* rule of invalidity" and must be invalidated unless the state can show the law "advances a legitimate local purpose that cannot be adequately served by reasonable

nondiscriminatory alternatives." *Oregon Waste Systems, Inc. v. Dep't of Env. Quality of Ore.*, 511 U.S. 93, 99 (1994) (quoting *New Energy Co. of Ind. v. Limbach*, 486 U.S. 269, 278 (1988)); *see also Camps Newfound Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564, 575 (1997); *Fulton Corp. v. Faulkner*, 516 U.S. 325, 331 (1996). " . . . [D]iscrimination simply means differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter." *Oregon Waste Systems*, 511 U.S. at 99. If the regulation is nondiscriminatory, it may be sustained unless "the burden imposed on [interstate] commerce is clearly excessive in relation to the putative local benefits. *Camps Newfound*, 520 U.S. at 596 (citing *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970)).

The Demonstration of Montana Presence provision in the QAP is subject to the highest scrutiny because it facially discriminates against interstate competition. This provision benefits in-state developers, and burdens out-of-state developers, by providing an advantage "if a member of its development team is Montana based." (QAP, p. 23.) This is not even-handed regulation, as required by the Commerce Clause. It is discriminatory, and it directly disadvantaged Ft. Harrison in this matter. Accordingly, the provision is *per se* invalid, not subject to the lower standard of review as Intervenors contend. The Board and Intervenors have not, and cannot, show this provision advances a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives.

Even if the provision were subject to the lower standard, which they are not, Intervenors' justification for discriminating against Ft. Harrison is unsupported and insufficient. Intervenors claim the discrimination in this case is justified because "Montana developers . . . better understand the needs for fair and adequate housing in the Montana area and can assist out-of-state interests" and "better understand Montana statues and regulations which will allow for an expedited process which would assist the various entities." (Intervenors Br., p. 9.) Intervenors have produced nothing that would indicate that in-state developers would understand these things better than Ft. Harrison, a well informed, sophisticated developer. In fact, in her deposition testimony, Ms. Bair admitted staff had not considered whether Ft. Harrison satisfied these concerns. (Bair Depo. 77:11-18.) Furthermore, the simple fact that in-state developers "can assist" out-of-state developers like Ft. Harrison does not satisfy even the lower standard.

In addition, *Maryland v. Louisiana*, which Ft. Harrison cites in its brief in support, is on-point and controlling in this matter, contrary to Intervenors' claims. The Court should reject

outright Intervenors' attempt to cast dispersions on the constitutional principles held by the United State Supreme Court in *Maryland*. Intervenors ask the Court to disregard *Maryland* because it was "decided 20 years ago" and is "a singular (dissimilar) case." (Intervenors' Br, p. 8.) However, as it did in *Maryland*, the United States Supreme Court has repeatedly held that the use of tax credits to discriminate against interstate commerce is unconstitutional. *See, e.g., Camps Newfound Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564, 575 (1997); *New Energy Co. of Ind. v. Limbach*, 486 U.S. 269 (1988).

Maryland and similar cases, such as *New Energy*, also undermine Intervenors' remaining arguments. In *New Energy*, the Supreme Court reversed the Ohio Supreme Court, and held unconstitutional an Ohio statute permitting a tax credit for fuel produced in Ohio, or in another state offering similar tax advantages to fuel produced in Ohio. *New Energy*, 486 U.S. at 271. There, an Indiana fuel producer sought declaratory and injunctive relief, claiming the statue violated the Commerce Clause by discriminating against out-of-state fuel producers to the advantage of in-state industry. *Id.* at 272-73.

The United States Supreme Court held the law violated the Dormant Commerce Clause. *Id.* at 280. The Supreme Court held the statute was discriminatory because it "explicitly depriv[ed] certain products of generally available beneficial tax treatment because they [were] made in certain other States" and therefore subject to the highest scrutiny. *Id.* at 274-75. It noted that even where a state does not raise "an absolute ban" against out-of-state commerce, simply imposing additional costs or an "economic barrier" against out-of-state competition is sufficient to render the regulation unconstitutional. *Id.* at 275. Finally, the Supreme Court held that "where discrimination is patent . . . neither a widespread advantage to in-state interests nor a widespread disadvantage to out-of-state competitors need be shown." *Id.* at 276.

Like the regulation in *New Energy*, the Montana Presence provision is unconstitutional. As explained above, the criteria explicitly deprives Ft. Harrison of benefits granted to in-state developers. As the Supreme Court explains in *New Energy*, it does not matter whether the discriminatory provisions in the QAP are an "absolute bar" to commerce, as Intervenors argue. (Intervenors Br., p. 8.) The additional costs and economic barriers these provisions place on Ft. Harrison are sufficient grounds for invalidation. As stated in *Maryland*, and again in *New Energy*, no matter the extent of the discrimination, the Court must reject it. Considering these

things, the Court should invalidate the discriminatory portions of the QAP, and the award based upon it.

CONCLUSION

For the foregoing reasons, the Court should reject the arguments by the Board and Intervenors and grant Ft. Harrison's motion for summary judgment.

Dated this 19th day of November, 2012.

CROWLEY FLECK PLLP

Michael Green
Attorneys for Ft. Harrison Veterans Residence, L.P.

CERTIFICATE OF SERVICE

I, Michael Green, hereby certify that on the 19th day of November, 2012, I had mailed via U.S. mail, a true and correct copy of the foregoing to the following:

Greg Gould
Luxan & Murfitt, PLLP
Montana Club Building
24 West Sixth Avenue, 4th Floor
P.O. Box 1144
Helena, MT 59624-1144

Oliver H. Goe
G. Andrew Adamek
Browning, Kaleczyc, Berry & Hoven, PC
800 N. Last Chance Gulch, Suite 101
P.O. Box 1697
Helena, MT 59624-1697

CROWLEY FLECK PLLP